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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKET SECTION

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Joint Application of )  
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)

AMERICAN AIRLINES, INC. and )  
EXECUTIVE AIRLINES, INC., FLAGSHIP )  
AIRLINES, INC., SIMMONS AIRLINES, INC., )  
and WINGS WEST AIRLINES, INC. )  
(d/b/a AMERICAN EAGLE) )

Docket OST-95-792 -38

and )  
CANADIAN AIRLINES INTERNATIONAL LTD., )  
and ONTARIO EXPRESS LTD. and TIME AIR INC. )  
(d/b/a CANADIAN REGIONAL) and )  
INTER-CANADIAN (1991) INC. )  
)

under 49 USC §§41308 and 41309 for approval )  
of and antitrust immunity for commercial )  
alliance agreement )  
)

PETITION FOR RECONSIDERATION OF UNITED AIR LINES, INC.

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DATED: August 5, 1996

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

Joint Application of

AMERICAN AIRLINES, INC. and  
EXECUTIVE AIRLINES, INC., FLAGSHIP  
AIRLINES, INC., SIMMONS AIRLINES, INC.,  
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and

CANADIAN AIRLINES INTERNATIONAL LTD.,  
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INTER-CANADIAN (1991) INC.

Docket OST-95-792

under 49 USC §§41308 and 41309 for approval  
of and antitrust immunity for commercial  
alliance agreement

DATED: August 5, 1996

PETITION FOR RECONSIDERATION OF UNITED AIR LINES, INC.

United Air Lines, Inc. ("United") hereby petitions the Department for reconsideration of Order 96-7-21, which granted antitrust immunity for the alliance agreement between American Airlines and its regional affiliates and Canadian Airlines and its regional affiliates, to the extent the Order concludes that due process considerations do not require the Department to give simultaneous consideration to the Joint Application of United and Air Canada for antitrust immunity. The Department's conclusion is erroneous as a matter of law and must, therefore, be reversed. In support of its Petition, United hereby states as follows:

In Order 96-7-21, the Department acknowledged that its grant of antitrust immunity to the alliance agreement between American

and Canadian was in conflict with the terms of its International Policy Statement, under which the Department has said that it would grant antitrust immunity for such alliances only when the foreign carrier's homeland had entered an Open Skies agreement with the United States.<sup>1/</sup> United, among others, had noted this fact previously, urging the Department either to defer action on the application until the terms of the Policy Statement had been satisfied, or in the alternative, to institute a comparative proceeding which would allow other potential applicants to enjoy contemporaneous consideration of their applications for antitrust immunity. See Motion of United to Defer Application, dated January 25, 1996; Comments of United, dated February 6, 1996.

Contemporaneous consideration is particularly important in the present context, as United pointed out, Comments at 8, because the Department's public interest analysis looks to whether grant of an application for antitrust immunity will substantially reduce competition in any relevant market. Because the grant of an application for antitrust immunity will, all things being equal, lead to greater market concentration, an applicant granted a hearing in advance of similar applicants is

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<sup>1/</sup> The Department said that "... the differences between the Canadian air services agreement and a full-fledged open-skies agreement do not justify denying antitrust immunity to the American-CAI alliance." Order 96-7-21, at 8.

likely to face a much lower burden in meeting the requisite public interest standard.<sup>2/</sup>

United is likely to be substantially prejudiced by this action. The antitrust immunity to be enjoyed by American and Canadian will allow those carriers to act as a single entity with a tremendous international reach unmatched by any other carrier in transborder markets. In the absence of any guarantee that the United/Air Canada alliance will receive similar treatment, this potentially dominant alliance will not face effective market discipline.<sup>3/</sup> The present case thus stands in sharp contrast to the grant of antitrust immunity to the alliance between KLM and Northwest, in which the Department dismissed fears of that alliance's potentially dominant market share by pointing to the Open Skies agreement between the U.S. and the Netherlands and the ever-present threat of new entry or expanded capacity. See Order 92-11-27, at 15-16.

Instead, the Department, recognizing the anticompetitive effects likely to flow from its decision, placed restrictions on the alliance in the New York-Toronto and third-country markets.

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<sup>2/</sup> This fact, and the concomitant changes in market structure which will face subsequent applicants for antitrust immunity, are not overcome by the fact that the Department found that the American/Canadian alliance would not substantially reduce competition in any market.

<sup>3/</sup> Indeed, several carriers filed comments in Docket OST-96-1434 on August 2, 1996, urging that the United/Air Canada alliance not be awarded antitrust immunity notwithstanding the award of immunity to the competing American/Canadian alliance.

These restrictions, by themselves, are not likely to be effective. Indeed, the limitations on U.S. carrier service for U.S.-Montreal, -Vancouver and -Toronto are much broader than the single New York-Toronto city-pair where antitrust immunity for the alliance is restricted. Nevertheless, the Department in Order 96-7-21 approved the American/Canadian application for antitrust immunity, disregarding United's request for contemporaneous consideration of an application it filed with Air Canada.

Although failure to grant contemporaneous consideration to the United/Air Canada application might be appropriate for an antitrust enforcement agency facing a merger application, it is wholly inconsistent with the duty of a regulatory agency to provide contemporaneous consideration of potentially mutually exclusive applications under Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945) and its progeny. In its Final Order, however, the Department rejected United's Ashbacker-based due process arguments, holding that the comparative hearing requirement of that case does not apply to the applications at issue because it has imposed "no policy of limiting the number of immunized alliances...." The Department's reasoning is plainly at odds with relevant precedent, under which "[i]t is economic not legal mutual exclusivity that triggers Ashbacker." Public Utilities Commission of California v. Federal Energy Regulatory Commission, 900 F.2d 269, 277, at note 6

(D.C.Cir. 1990) (citing, inter alia, Delta Air Lines v. Civil Aeronautics Board, 228 F.2d 17, 22 (D.C.Cir. 1955)) (other citations omitted). Indeed, it appears that Ashbacker rights are triggered wherever an agency is charged by statute with determining the public interest before granting an application;<sup>4/</sup> such is the case with respect to an application for antitrust immunity, as the Department is aware.<sup>5/</sup>

Although the Department clearly foresaw that "the approval of [the American/Canadian application could] change the market structure in ways that could make more likely the potential disapproval of" the United/Air Canada application, Order 96-7-21, at 14, it acted as if the effects of the first approval on the latter application were not relevant under Ashbacker. Again, this approach is plainly wrong. In Kodiak Airways, Inc. v. Civil Aeronautics Board, 447 F.2d 341, 350-351 (1971), the Court of Appeals for the District of Columbia ruled that the CAB had violated its duty under Ashbacker where, without contemporaneous

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<sup>4/</sup> In Cheney Railroad Company, Inc. v. Interstate Commerce Commission, 902 F.2d 66, 69 (D.C.Cir. 1990), the court refused to extend Ashbacker rights to an applicant where the relevant statute required only the selection of a "financially responsible person." The court noted, however, that where a public interest determination was statutorily required, "an agency is arguably required to adopt procedures that result in the selection of superior candidates." (citations omitted). The broad view of the D.C. Circuit with respect to the application of Ashbacker thus would appear to contradict the Department's narrower approach.

<sup>5/</sup> See Order 96-7-21, at 13 (describing the public interest determinations necessary to its grant of the American/Canadian application).

consideration, it granted exemption authority to one carrier and may thereby have reduced the likelihood of approval of another carrier's certificate application. The court drew a link between the certificate applicant's Ashbacker rights and the Board's required public interest determination:

The primary benefit to the public which might result from a grant of exemption authority would, of course, be in additional or improved air service. However, such a grant is not necessarily in the public interest... It must also be shown that the improved service outweighs any detrimental effects resulting from the grant. In this case Kodiak alleges that the grant of exemption authority and Wien's operations conducted pursuant thereto will detrimentally affect the later certification proceedings. This element of possible prejudice under Ashbacker is clearly a major factor to be considered in determining the public interest. ... 1. The question presented, then, is whether the Board's findings ... indicate that it adequately considered the possibility of prejudice under Ashbacker and concluded that this possibility was outweighed by the improved service which Wien would allegedly provide. (emphasis added).

The Department in Order 96-7-21 could not have found that the possibility of prejudice under Ashbacker was outweighed by any public interest benefits resulting from its action, as required by Kodiak, given that the Department explicitly refused to consider the possible prejudice to the United/Air Canada application of its grant to American and Canadian.

The Department also based its denial of United's Ashbacker rights on the alternative theory that United's application came too late to trigger them, citing the fact that the United/Air Canada application was not filed until shortly after the Department's tentative decision, dated May 28, 1996 to grant antitrust immunity to American and Canadian. This rationale is

unavailable to the Department here, given United's repeated requests for institution of a comparative proceeding in this docket, dated January 25, 1996 and February 6, 1996.


Moreover, the Department's tentative decision granting the American/Canadian application was the first notice to United that the Department would make an exception to its International Policy Statement, given the Department's failure to address United's earlier requests for clarification of its policy and/or institution of a comparative proceeding. Regardless whether that policy judgment was correct, United should not be penalized for its reliance on the Department's stated policy, particularly where, as here, United had twice requested that the Department clarify its policy and, if necessary, set up a proceeding to allow competing applications to be filed. See Motion of United to Defer Application, dated January 25, 1996; Comments of United, dated February 6, 1996.

Given that the Department took no action in response to United's repeated requests for clarification and/or consolidation, its denial of United's rights under Ashbacker based upon the timeliness of its application is arbitrary and capricious. Indeed, such a policy, taken to its logical extreme, would require a carrier to file a competing application -- and thereby incur all the transactional and other costs attendant to its preparation -- at any time another carrier had applied for a license of any kind, no matter how outlandish or at odds with

Departmental policy the request might be. United should not be denied its due process rights under Ashbacker for its reliance on established Departmental policy.

WHEREFORE, United Air Lines, Inc. respectfully requests that the Department reconsider and rescind Order 96-7-21 in order to allow for contemporaneous and comparative consideration of the applications for antitrust immunity of American Airlines, Inc. and Canadian Airlines International, Ltd., et al., on the one hand, and United Air Lines, Inc. and Air Canada, on the other hand.

Respectfully submitted,



JOEL STEPHEN BURTON  
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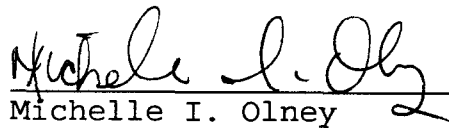
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**DATED: August 5, 1996**  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the foregoing Petition on all persons named on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.

  
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Michelle I. Olney

**Dated: August 5, 1996**

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